FILE COPY

Office-Supreme Court, U.S.
FILED
JUL 1 1959
JAMES R. BROWNING, Clerk

No. 78

In the Supreme Court of the United States

OCTOBER TERM, 1959

CARMEN M. LOHR, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
MORTON HOLLANDER,
HOWARD E. SHAPIRO,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and rule involved	2
Statement	3
Argument	5
Conclusion	12

CITATIONS

Cases:

Berman v. *United States*, 302 U.S. 211	10
Cobbledick v. *United States*, 309 U.S. 323	9
Federal Deposit Insurance Corp. v. *Congregation Poiley Tzedeck*, 159 F. 2d 163	6
Federal Facilities Realty Trust, In re, 227 F. 2d 651	6
Hohorst v. *Hamburg-American Packet Co.*, 148 U.S. 262	7
Hunteman v. *New Orleans Public Service, Inc.*, 119 F. 2d 465, certiorari denied, 314 U.S. 647	7
Lemke v. *United States*, 346 U.S. 325	6, 10
Oneida Nav. Corp. v. *W. & S. Job & Co.*, 252 U.S. 521	7
Parker v. *United States*, 153 F. 2d 66	9
Sears, Roebuck & Co. v. *Mackey*, 351 U.S. 427	7
Stevens v. *Turner*, 222 F. 2d 352	9
Studer v. *Moore*, 153 F. 2d 902	9
United States v. *Crescent Amusement Co.*, 323 U.S. 173	9
United States v. *Hark*, 320 U.S. 531	11

512414—59

Cases—Continued

	Page
United States v. *Isthmian Steamship Co.*, 359 U.S. 314	9
United States v. *Schaefer Brewing Co.*, 356 U.S. 227	7, 11
Zarati S.S. Co. v. *Park Bridge Corp.*, 154 F. 2d 377	8

Statutes and Rules:

Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, *et seq*	3
28 U.S.C. 1291	2, 6
28 U.S.C. 2072	7
28 U.S.C. 2680(h)	11
28 U.S.C. 2680(k)	11
Federal Rules of Civil Procedure:	
Rule 54(b)	7
Rule 73(a)	2, 6

Miscellaneous:

Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure*, 49 Harv. L. Rev. 1303	7
Report of Proposed Amendments to the Rules of Civil Procedure (1955) 54–55	8

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 78

CARMEN M. LOHR, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the Southern District of Florida (R. 7) is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1–3) is reported at 264 F. 2d 619.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1959 (Pet. App. 1). A timely petition for rehearing was denied on April 16, 1959 (Pet. 2). A petition for a writ of certiorari was filed May 26, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court of appeals acquires jurisdiction of an appeal noted before the order appealed from is final because of subsequent action by the district court with respect to the remainder of the case.

STATUTE AND RULE INVOLVED

1. 28 U.S.C. 1291 provides in pertinent part as follows:

> Final decisions of district courts
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court.

2. Rule 73(a) of the Federal Rules of Civil Procedure provides as follows:

> (a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time

for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the Appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

STATEMENT

This is a suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, *et seq.*, arising out of the certification as airworthy by the Civil Aeronautics Administration of a commercial aircraft which crashed while being flown by the petitioner's husband. The petitioner alleged that the United States had negligently certified the aircraft

to be airworthy, when in fact it was not, and that this was a proximate cause of the crash. In addition to the United States and its agency, the Civil Aeronautics Administration, the petitioner named as co-defendants the owner of the aircraft, Riddle Airlines, Inc., and two alleged agents of the Government, Sandy and Company, a corporation, and Hector Alexander, an individual (R. 1–5).

The petitioner's second amended complaint (R. 1) was filed on June 24, 1958, in the United States District Court for the Eastern District of Florida. On August 12, 1958, the second amended complaint was dismissed, with prejudice, as to the United States on the ground "that the allegations contained in the second amended complaint fail to show a duty owing the [petitioner] by the United States of America, or the Civil Aeronautics Administration for which a cause of action would lie under the Federal Tort Claims Act" (R. 7).

Although no disposition of the case had been made by the district court as to the co-defendants, Riddle Airlines, Sandy and Company, and Hector Alexander, the petitioner, on August 25, 1958, filed a notice of appeal from the order dismissing the case as to the United States (R. 8). Three weeks later, on September 15, 1958, the record with respect to this appeal was docketed in the Court of Appeals (R. cover). The district court, however, continued to exercise jurisdiction in the cause, and on November 12, 1958,

it granted a motion for summary judgment by Riddle Airlines[1] (Pet. App. 1).

On December 5, 1958, the United States filed a motion to dismiss the appeal against it on the ground that the case was still pending against Sandy and Company and Hector Alexander (Pet. App. 2). Immediately thereafter, counsel for the petitioner discontinued her case against Sandy and Company and Hector Alexander, who had never been served, by taking a voluntary non-suit as to them (Pet. App. 1).

The Court of Appeals heard argument both on the motion to dismiss the appeal and on the merits. Thereafter, on March 20, 1959, it held that the notice of appeal filed August 25, 1958, did not confer jurisdiction upon it because the judgment appealed from was not a final order (Pet. App. 1–3).

ARGUMENT

The petitioner recognizes that the appeal noted on August 25, 1958, was premature because her complaint was still pending against the three remaining defendants (Pet. 6). She argues, however, that this appeal, even though noted from a decision which was not final, later conferred jurisdiction on the Court of Appeals, because, while the premature appeal was pending, the district court disposed of her claims against one defendant and allowed a voluntary non-suit as to the other two. This contention, which departs from well-recognized principles of appellate

[1] Riddle Airlines' motion was based upon the fact that the petitioner had received full compensation under the Florida Workmen's Compensation Law (Pet. 5).

jurisdiction, is not supported by *Limke* v. *United States*, 346 U.S. 325, the only federal authority cited by the petitioner's counsel, or by any other federal decision. On the contrary, the decision below accords with rulings by this Court and other courts of appeals as to proper appellate practice. Further, it presents no question of general importance to the administration of appeals. Accordingly, this case does not merit review by this Court.

The Judicial Code provides (28 U.S.C. 1291, *supra*, p. 2) that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *." Under present-day practice an appeal is taken simply by filing in the district court a notice of appeal. Fed. R. Civ. P. 73(a), *supra*, pp. 2–3. This notice is not a mere formality, however. It is a jurisdictional step, which, if effective, transfers all jurisdiction over the merits of the cause from the district court to the court of appeals (see, *e.g.*, *In re Federal Facilities Realty Trust*, 227 F. 2d 651, 653–654 (C.A. 7), and cases cited therein); consequently, "[m]ore is at stake than informing the appellee that the appellant is not content with the judgment." *Federal Deposit Insurance Corp.* v. *Congregation Poiley Tzedeck*, 159 F. 2d 163, 166 (C.A. 2). The notice of appeal serves as the signal for transfer of the cause, the point of demarcation between the relative powers of the district court and the courts of appeals over a specific case. *Id.*

Whether the notice is effective or not depends upon whether a final and, hence, reviewable decision has

been reached by the district court. There are no automatic formulae to determine this. It depends, of course, upon the intentions and actions of the district judge who bears the burden of decision. *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227. But there can be no doubt that in this case there was no final appealable order until the case had been finally disposed of as to all of the parties the petitioner charged with joint liability for the death of her husband. See, e.g., *Oneida Nav. Corp.* v. *W. & S. Job & Co.*, 252 U.S. 521; *Hohorst* v. *Hamburg-American Packet Co.*, 148 U.S. 262; *Hunteman* v. *New Orleans Public Service, Inc.*, 119 F. 2d 465 (C.A. 5), certiorari denied, 314 U.S. 647.

A decision may be "final" in the sense that a court of appeals has statutory jurisdiction to entertain it, and yet not be appealable because the judicial unit for purposes of appeal includes the whole case—all claims against all parties. *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 431–432, fn. 3. Appealability in the latter sense is also sometimes described in terms of "finality". But it is an aspect of finality which this Court may modify through exercise of its rule-making powers. 28 U.S.C. 2072; see Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure*, 49 Harv. L. Rev. 1303. This has been done with respect to the unit for purposes of appeal in cases involving multiple claims. Fed. R. Civ. P. 54(b); see *Sears, Roebuck & Co.* v. *Mackey*, *supra*. But it has not been done with respect to closely interrelated claims against multiple parties. When such

claims are brought against multiple parties, the unit for appeal is still the whole case.[2] See, *e.g.*, *Zarati S.S. Co.* v. *Park Bridge Corp.*, 154 F. 2d 377, 379 (C.A. 2), and cases cited therein.

Thus, when the petitioner filed her notice of appeal from the order dismissing her claim for failure to state a cause of action against the United States, there was no final judgment from which to appeal because the rest of the case was still pending against the three remaining parties defendant whom she charged with joint liability for the death of her decedent. The petitioner does not dispute this; nor does she deny that her appeal was consequently subject to dismissal so long as the case was still pending against the remaining defendants in the district court.

She argues, however, that the notice of appeal, even if ineffective when filed, could be made effective by subsequent action of the district court in disposing of the remaining claims. If this be so, there is no reason why cautious counsel should not regularly file a notice of appeal from each portion of a case as it is decided, and docket the record piecemeal in the higher court. Nor is there any just reason why an appellate court should ever dismiss a premature appeal—the

[2] In 1955 the Advisory Committee on Rules of Civil Procedure proposed that Fed. R. Civ. P. 54(b) be amended to permit entry of judgment as to a single party in a multiple party case upon an express direction to that effect by the district judge accompanied by a determination that there is no just reason for delay in disposition of that portion of the case. Report of Proposed Amendments to the Rules of Civil Procedure (1955) 54–55. This would have permitted appeals in multi-party cases in advance of disposition of the whole case. The proposal was not adopted.

matter should simply be held in abeyance until the district court has completed disposition of the remaining claims, *i.e.*, until the appellant has finished contesting those pieces of his case which are still in the court below. Obviously, this would be a radical departure from the long-standing policy against piecemeal appeals. See *Cobbledick* v. *United States*, 309 U.S. 323; *Parker* v. *United States*, 153 F. 2d 66, 69 (C.A. 1). If this principle is to be modified, it must be done through legislation or by changes in the rules of procedure, not through a single decision called forth by a procedural accident in an isolated case. Cf. *United States* v. *Isthmian Steamship Co.*, 359 U.S. 314.

It is well established under the Federal Rules of Civil Procedure that a notice of appeal filed from an order which is not final does not confer jurisdiction upon the appellate tribunal to consider the merits of the cause, even though steps are subsequently taken in the district court to render the judgment final. This Court applied this doctrine in dismissing a direct appeal prematurely noted by the United States from a judgment which was not final because a motion to amend the findings was still pending in the district court. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173. And, like the court below, other courts of appeals have reached the same result. *Studer* v. *Moore*, 153 F. 2d 902 (C.A. 2); *Stevens* v. *Turner*, 222 F. 2d 352 (C.A. 7).

The *Studer* case is identical to the case at bar. Studer brought suit against the Comptroller of New York and the Irving Trust Company for a declara-

tory judgment that he was the owner of money deposited in the Trust Company and transferred to the Comptroller. He appealed from a judgment dismissing his complaint as against the Comptroller while the action against the Irving Trust Company was still undecided. After the argument of the case, he discontinued the action against Irving Trust Company at the suggestion of the court of appeals. But on further reflection the Second Circuit unanimously held that, "since the original appeal did not remove the cause, nothing done thereafter in the district court could supply its place. A new appeal must be taken." The appeal was dismissed.

Petitioner's reliance upon *Lemke* v. *United States*, 346 U.S. 325, is entirely misplaced. That case did not involve an appeal noted before a decision had become final, but an appeal noted from a final decision in a criminal case before that final decision had been formalized in a written judgment. The sentence itself was the final judgment. *Berman* v. *United States*, 302 U.S. 211, 212. Thus, this Court's holding in Lemke is simply that formalization of the sentence is not a jurisdictional prerequisite to an appeal by a defendant in a criminal case. An appeal noted before such formalization, therefore, is not premature.

The distinction between *Lemke* and this case is easily demonstrated. If, to presuppose a situation parallel to *Lemke*, the district court in this case had ordered orally that it be dismissed as to all parties defendant, and if petitioner had thereafter filed a notice of appeal from this order before it was formal-

ized in a written judgment and noted on the docket book, the notice of appeal might well become effective when the ministerial requirement of formal entry in the docket had been performed. "No form of words * * * is necessary to evince [the] rendition [of a judgment]." *United States* v. *Hark*, 320 U.S. 531, 534; *United States* v. *Schaefer Brewing Co.*, *supra*, at 232. But in this case, unlike *Lemke*, there was no final decision at all when the notice of appeal was filed, nor could there be a final decision until the case was disposed of as to the remaining parties.

Equally inapplicable are the authorities from the state courts cited by petitioner, since all of them arose under jurisdictional provisions and rodes of practice materially different from those obtaining in the federal courts.

We believe it also appropriate to note still an additional and independent reason for not granting certiorari in this case. Examination of two specific exclusionary provisions of the Tort Claims Act makes it plain that the district court did not have jurisdiction to award damages to plaintiff against the United States under the Tort Claims Act. The gravamen of her complaint was that the Civil Aeronautics Administration had, in an official certificate of airworthiness, negligently represented the aircraft in which her husband perished to be airworthy when in fact it was not. Actions for misrepresentation, whether negligent or willful, are expressly excluded from the scope of the Tort Claims Act. 28 U.S.C. 2680(h). Quite apart from this, it is plain from the face of the complaint that the allegedly negligent inspection took place at the time the aircraft was converted in Venice, Italy (R. 3–4). Thus the complaint is also barred because it purports to state a claim arising in a foreign country. 28 U.S.C. 2680(k).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
MORTON HOLLANDER,
HOWARD E. SHAPIRO,
Attorneys.

JULY 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1959